

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STEPHEN M. CASTURA,	§
	§
Defendant Below-	§ No. 606, 2008
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr. ID 0803004836
Plaintiff Below-	§
Appellee.	§

Submitted: May 18, 2009

Decided: July 16, 2009

Revised: August 3, 2009

Before **HOLLAND, BERGER**, and **JACOBS**, Justices.

ORDER

This 16th day of July 2009, upon consideration of the appellant's Supreme Court Rule 26(c) brief, his attorney's motion to withdraw, and the State's response thereto, it appears to the Court that:

(1) In September 2008, a Superior Court jury convicted the defendant-appellant, Stephen Castura, of possession of a firearm by a person prohibited, second degree forgery, criminal impersonation, trespassing for the purposes of hunting, hunting without a license, and hunting deer without wearing orange clothing. The Superior Court sentenced Castura on the weapon charge to a mandatory three-year term at Level V incarceration. On

the forgery and criminal impersonation convictions, the Superior Court sentenced Castura to a total term of three years at Level V incarceration, to be suspended entirely for two years of probation. The Superior Court fined Castura \$50 on each of the remaining three charges. This is Castura's direct appeal.

(2) Castura's counsel on appeal has filed a brief and a motion to withdraw pursuant to Rule 26(c). Castura's counsel asserts that, based upon a complete and careful examination of the record, there are no arguably appealable issues. By letter, Castura's attorney informed him of the provisions of Rule 26(c) and provided Castura with a copy of the motion to withdraw and the accompanying brief. Castura also was informed of his right to supplement his attorney's presentation. Castura has raised several issues for the Court's consideration. The State has responded to Castura's points, as well as to the position taken by Castura's counsel, and has moved to affirm the Superior Court's judgment.

(3) The standard and scope of review applicable to the consideration of a motion to withdraw and an accompanying brief under Rule 26(c) is twofold: (a) this Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for arguable claims; and (b) this Court must conduct its own review of the record and

determine whether the appeal is so totally devoid of at least arguably appealable issues that it can be decided without an adversary presentation.¹

(4) The testimony at trial established that, on the afternoon of January 26, 2008, Michael Colicchio was fishing at Hoopes Reservoir. As he was leaving his fishing spot, Colicchio ran into a man dressed in camouflage clothing and holding a shotgun. Colicchio spoke briefly to the hunter, who raised his gun and shot at a deer in the distance. The hunter ran after the deer, and two cans of beer fell from his pocket. Colicchio continued walking and spotted a silver pickup truck nearby. Thereafter, Colicchio called authorities to report the incident, giving a description of the hunter and the pickup truck. About two hours later, Colicchio received a phone call at home asking him to return to Hoopes Reservoir to see if he could identify someone that officers had detained. Colicchio identified Castura as the hunter he had encountered that afternoon. Colicchio made the same identification in court at Castura's trial.

(5) Sergeant John Webb, of the Department of Natural Resources and Environmental Control, also testified at Castura's trial. He responded to a trespassing call at Hoopes Reservoir. He positioned his vehicle near the

¹ *Penson v. Ohio*, 488 U.S. 75, 83 (1988); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 442 (1988); *Anders v. California*, 386 U.S. 738, 744 (1967).

entrance where the trespassing hunter had reportedly been seen. Another officer positioned his vehicle on an adjacent road, and yet another officer was posted on foot in the woods nearby. The officers spotted a silver pickup truck matching the description given by Colicchio. Four men were in or near the truck. One man, in full camouflage, had an unloaded shotgun propped next to him. When he returned to the scene, Colicchio identified the man in camouflage as the hunter he had seen earlier. When authorities issued him a criminal summons, Castura signed it using his uncle's name. When Castura eventually was arrested a month later, he told Sgt. Webb that he had lied about his identity on the night of the trespassing incident because he knew he was wanted and that he could not possess a firearm. The jury convicted Castura on all counts.

(6) Castura has raised several issues in response to his counsel's motion to withdraw. First, he contends that the prosecutor in his case had an inappropriate and unethical exchange with one of the jurors. Next, he contends that the State presented inconsistent and insufficient evidence and that Colicchio's testimony, in particular, was not credible because he had a motive to lie. Finally, Castura challenges the propriety of Colicchio's identification of him at the scene.

(7) Before addressing the substance of Castura’s claims, we note that three of Castura’s convictions are not subject to appellate review by this Court. On the charges of trespassing to hunt, hunting without a license, and failure to wear proper safety attire while hunting, the Superior Court sentenced Castura to a pay a \$50 fine on each charge. This Court’s constitutional jurisdiction is limited to hearing criminal appeals “in which the sentence shall be death, imprisonment exceeding one month or fine exceeding One Hundred Dollars.”² In cases of multiple convictions, each sentence must be evaluated individually in order to determine whether it meets the constitutional threshold.³ Because these three sentences do not meet the jurisdictional requirement, Castura’s appeal as to those convictions must be dismissed without review.

(8) In his first point on appeal, Castura appears to argue that the trial judge abused her discretion for failing to dismiss a juror who approached the prosecutor during a luncheon recess after the completion of jury selection. The record reflects that the prosecutor was buying her lunch when a juror, who was seated at a nearby table, asked the prosecutor if the trial would start that day. Upon returning to the courtroom after the recess,

² Del. Const. art. IV, § 11(1)(b).

³ *Marker v. State*, 450 A.2d 397, 399 (Del. 1982).

the prosecutor informed the trial judge of the exchange, identifying the juror who had spoken to her. The judge then questioned the juror outside the presence of counsel. The juror's account of the exchange paralleled the prosecutor's account. The judge reported back to counsel prior to the jury's return. Defense counsel did not request that the juror be discharged. Given defense counsel's failure to request dismissal of the juror and in light of the innocuous nature of the exchange between the juror and the prosecutor, we find no plain error in the trial judge's failure to dismiss the juror *sua sponte*.⁴

(9) Castura next implies that the evidence was insufficient to support his convictions because of alleged inconsistencies in the testimony. Castura also suggests that Colicchio's testimony, in particular, was not credible because he was motivated to testify for the State in order to avoid being charged with illegally fishing at Hoopes Reservoir.

(10) When a defendant raises a sufficiency claim on appeal, the relevant question for this Court is whether "after reviewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."⁵ In this case, we find the State's evidence sufficient to support Castura's

⁴ See *Weber v. State*, 547 A.2d 948, 954 (Del. 1988).

⁵ *William v. State*, 539 A.2d 164, 168 (Del. 1988) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

convictions beyond a reasonable doubt. Although Castura argues that there were inconsistencies in the testimony and that Colicchio was not credible because he was trying to avoid being charged himself, the jury is solely responsible for judging the credibility of the witnesses and resolving conflicts in the evidence.⁶ It was entirely within the jury's purview to credit the testimony of the State's witnesses at trial.

(11) Finally, Castura suggests that Colicchio's "show-up" identification of Castura was improper. No objection to the identification procedure was raised at trial, however. Accordingly, this claim is only reviewable for plain error.⁷ To be plain, the error complained of, generally speaking, must have affected the outcome of the trial.⁸ Castura's claim fails because it is clear that the admission of Colicchio's identification of Castura at the scene did not affect the outcome of the trial. Sgt. Webb testified that when he arrested Castura a month after the incident Castura spoke freely to Webb about hunting at Hoopes Reservoir and specifically told him that he had been hunting there on January 26 and that he had given Webb a false name that night because he knew he was prohibited from possessing a

⁶ *Tyre v. State*, 412 A.2d 326, 330 (Del. 1980).

⁷ Del. Supr. Ct. R. 8.

⁸ *Brown v. State*, 897 A.2d 748, 753 (Del. 2006).

firearm. In light of this overwhelming evidence, there was no plain error in the admission of Colicchio's show-up identification of Castura.

(12) This Court has reviewed the record carefully and has concluded that Castura's appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Castura's counsel has made a conscientious effort to examine the record and the law and has properly determined that Castura could not raise a meritorious claim in this appeal.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED, in part, and the appeal is DISMISSED, in part, as described herein. The motion to withdraw is moot.

BY THE COURT:

/s/ Carolyn Berger
Justice